Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

Case No. 14158 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,
Respondents,

Case No. 14180 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF FOR RESPONDENTS DAILY MAIL PUBLISHING CO., ET AL., IN OPPOSITION

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322
Counsel for Respondents,
Daily Mail Publishing Co., etc., et al.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .. 3

STATEMENT OF THE CASE 4

ARGUMENT 8

CONCLUSION 11

APPENDIX

Test of the Opinion of the Supreme Court of Appeals of West Virginia 1a

CITATIONS

CASES:

Cox Broadcasting Corporation v. *Cohn*, 429 U.S. 469 (1975) 8, 9, 10

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 11

Government of Virgin Islands v. *Brodhurst*, 285 F. Supp. 831 (D.C. Virgin Islands 1968) 9

Landmark Communications, Inc. v. *Commonwealth of Virginia*, 56 L.Ed.2d 1 (1978) 8, 10

Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976) 8

Oklahoma Publishing Company v. *District Court of Oklahoma County, Oklahoma* —— U.S. —— (1977) 8, 9, 10, 11

CONSTITUTION OF THE UNITED STATES:

First Amendment 2, 3, 5, 9, 10, 11, 12

Fourteenth Amendment 3, 4, 9, 11

STATUTES:

West Virginia Code 49-7-3 ..... 2, 3, 4, 5, 7

West Virginia Code 49-7-20 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-482

Case No. 14158 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., etc., et al.,
Respondents,

Case No. 14180 Below

THE HONORABLE ROBERT K. SMITH, Judge, et al., etc.,
Petitioners,

v.

DON MARSH, et al., THE DAILY GAZETTE CO., etc., et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF FOR RESPONDENTS DAILY MAIL PUBLISHING CO., ET AL., IN OPPOSITION

OPINION BELOW

The opinion set forth in the Appendix to the Petition is not the final opinion of the West Virginia Supreme Court of Appeals but was a draft opinion which was revised by that Court before publication.

The corrected final opinion of the court below is set forth as part of the certified record (R. 34)[1] and in the Appendix to this Brief at 1a. The changes in the final opinion are (i) in the eleventh line from the bottom of page 7a of the Appendix the word "inevitably" has been inserted before the word "recognizing"; (ii) on the same page, third line from the bottom, the word "prior" has been deleted; and (iii) on page 8a, in the next to the last line of the paragraph ending at mid-page, the word "prior" has been deleted before the word "restraint."

JURISDICTION

Respondents do not question the jurisdictional basis set forth in the Petition.

QUESTIONS PRESENTED

The Petitioners state that the sole question to be considered herein is "Whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment . . .", which is a correct statement of the question if the Court's review is to be limited to the rationale expressed in the Opinion below.

However, the Petition for Prohibition below raised additional questions of Constitutional dimensions which were not decided by the Court below[2] but which would have required the same result, *i.e.*, that West

[1] Since Petitioners failed to cause the record in the court below to be filed with this Court, Respondents caused a certified copy of the complete record in Case No. 14158 below to be certified by the clerk of that court and transmitted to the Clerk of this Court. References to the record (R.) will be to the page numbers affixed by the Clerk of the Supreme Court of Appeals of West Virginia.

[2] See fn. 3 to Court's opinion at 9a.

Virginia Code 49-7-3 is violative of the First and Fourteenth Amendments to the Constitution of the United States. These additional questions raised and presented to the Court below were:

First, whether phrased in terms of either "prior restraint" or "subsequent punishment", W. Va. Code 49-7-3 is violative of the First Amendment.

Second, whether by imposing criminal sanctions against "newspapers" only, W. Va. Code 49-7-3 denies Respondents the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Third, whether W. Va. Code 49-7-3, by requiring a newspaper to obtain an order of "the court" before publishing the name of a juvenile involved in a delinquency proceeding without prescribing any standards to guide the court in determining when publication should be permitted or denied, is violative of the First and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States and West Virginia Code 49-7-3 are set forth in the Petition at pp. 2, 3. However, Petitioners failed to include: (1) W. Va. Code 49-7-20 which prescribes the criminal penalties for violation of West Virginia Code 49-7-3 and (2) the relevant provisions of the Fourteenth Amendment.

West Virginia Code 49-7-20:

> "A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically pro-

vided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

Fourteenth Amendment, so far as relevant:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE [3]

The Court below consolidated for decision two separate cases. In one case, these Respondents invoked the original jurisdiction of the Supreme Court of Appeals of West Virginia and sought a Writ of Prohibition against the Judges of the Circuit Court of Kanawha County and the Prosecuting Attorney of that County to prevent further proceedings under a Grand Jury indictment of these Respondents for unlawfully publishing the name of a juvenile in violation of West Virginia Code 49-7-3 (Case No. 14158 below). In the second case, the Daily Gazette Company, publisher of The Charleston Gazette, and individual officers and employees of that newspaper, sought similar relief from prosecution for publishing the name of the same

[3] The Petition for a Writ of Prohibition below was verified (R. 13) and the truthfulness of the facts reported in The Charleston Daily Mail story of February 10, 1978, which was Exhibit D to the Petition for Prohibition was affirmatively pleaded (R. 7). For the purpose of this case, all of the allegations in the Petition for Prohibition below, including the factual statements in Exhibit D thereto, were admitted to be true by the Demurrer to the Petition (R. 25).

juvenile (Case No. 14180 below). In the view of the court below, the cases were consolidated because "both represent a conceptionally indistinguishable permutation of a classic First Amendment . . . issue . . . ."

There are, however, some factual differences in the two cases. Further, Petitioners' Statement of the Case inadequately states the facts material to the consideration of the question presented in their case and is misleading.

Petitioners correctly state that "On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia." Additional facts not included in Petitioners' Statement of the Case include: (1) minutes before classes were to begin three shots from a .22 caliber pistol were fired at close range into Arthur Smith, a 14-year old student, in a hallway at the school killing Smith almost instantly; (2) there were seven eye-witnesses to the homicide; (3) 14-year old Stuart Perrock, the alleged assailant, fled from the school; (4) law enforcement officers attempting to follow Perrock's flight found a message scrawled in the snow which read "Tell Smith I'm sorry;" (5) appoximately three hours after the fatal shooting, Perrock was found and taken into custody after a search involving Sheriff's Deputies, State Police and the use of a State Police helicopter; (6) when found, Perrock had in his possession a .22 caliber pistol and a knife.[4]

[4] Under West Virginia law at that time, a juvenile under the age of 16 could not commit a crime but could only be adjudicated a juvenile delinquent, resulting in a maximum penalty of incarceration in a juvenile center until age 18. Prior to its repeal by c. 65 of the Acts of the West Virginia Legislature, 1977, W. Va. Code 49-5-3 (Michie W. Va. Code Vol. 14, 1976 Replacement

All of the above facts, which were affirmatively pleaded by Respondents and demurred to by Petitioners, are contained in the Charleston Daily Mail story written by the Respondent, Mary Schnack, and published on the afternoon of February 10, 1978 (R. 21). As that news story discloses, the reporter's sources were identified and the material statements attributed to those sources. These sources included Lt. W. T. Markham of the Kanawha County Sheriff's Office, Trooper Don Caldwell of the West Virginia State Police, Chuck Miller, an Assistant Prosecuting Attorney of Kanawha County, and the mother of the slain juvenile, Mrs. Frazier Smith.

The record demonstrates that Respondents obtained their information about the slaying, including the identity of the alleged assailant, from police officials and an assistant prosecuting attorney of Kanawha County. There is no evidence in the record of this case to support the statement in the Petition that Respondents did not obtain Perrock's name by "lawful means or with the State's approval". Petition at 11. The record is conclusive to the contrary.

Volume) provided that if a juvenile committed an act which if committed by an adult would be a capital offense, the juvenile court had no jurisdiction. After the 1977 legislative enactment any offense committed by a juvenile under the age of 16, no matter how serious, was only an act of juvenile delinquency. Acts of the West Virginia Legislature, First Extraordinary Session 1977, c. 6 amending and reenacting W. Va. Code 49-5-10. Following the slaying of Arthur Smith, which gave rise to this case, the West Virginia Legislature, in its Regular Session, 1978, on March 11, 1978, amended and reenacted W. Va. Code 49-5-10 to permit, under certain circumstances, a transfer from the juvenile to criminal court jurisdiction of certain specified felonies, even though the juvenile be under the age of 16 years. Acts of the West Virginia Legislature, 1978, c. 14.

Although the slaying of Smith occurred early in the morning of February 9, 1978, and these Respondents were aware that Perrock had been taken into custody as the alleged slayer prior to the writing of the story about the homicide which appeared in the Charleston Daily Mail on the afternoon of February 9 (R. 17), Respondent editor Maurice decided not to use Perrock's name in the story because of the prohibition contained in W. Va. Code 49-7-3. As a result, the Daily Mail story which was published on the afternoon of February 9, and is reproduced in full in the record (R. 17), did not use Perrock's name. However, early on the morning of February 10, as the news and editorial staff of the Daily Mail (an afternoon newspaper) reported for work, these Respondents knew that it was already public knowledge that Perrock had been taken into custody as the alleged slayer of Smith. It was known to Respondents that Perrock's name had been published as the alleged slayer by Charleston radio station WCHS on February 9, by Charleston radio stations WCAW and WVAF in the early morning of February 10, and in a front page story in Charleston's morning newspaper, The Charleston Gazette, on February 10, the latter story and accompanying column and photograph being set forth in full in the record (R. 18, 19, 20). Faced with the fact that the identity of the alleged slayer of Smith was then public knowledge, Respondent Maurice determined that the Daily Mail should publish Perrock's name. The Daily Mail on February 10, 1978, without first applying for an order from the Circuit Court of Kanawha County permitting publication of Perrock's name, published the story (R. 5, 6, 7, 21) which gave rise to the indictment of these Respondents. A copy of the indictment returned against these Respondents appears in the record (R. 15, 16).

ARGUMENT

The narrow issue involved in this case is the right of the two daily newspapers in Charleston, West Virginia, to truthfully publish the name of a juvenile who the newspapers had learned through interviewing law enforcement officers and an assistant prosecuting attorney was alleged to have committed a homicide in one of the area schools. This case does not involve a broad constitutional challenge to the State's powers to keep juvenile proceedings and the names of juvenile defendants confidential or to punish someone who secures information about such proceedings by illegal means and thereafter divulges it. Nor, does this case involve any claimed constitutional right of access by the press to information regarding juvenile proceedings or records.

As such, this case is neither novel nor so important as to warrant review by this Court. While Petitioners may be correct in asserting that the Court has not ruled on the precise facts of this case, its prior decisions make clear that, even assuming that the State may deny access to government records or proceedings, it may not prohibit or punish the truthful publication of information regarding such records or proceedings once that information is obtained by the press unless the substantive evil occasioned by such publication is "extremely serious and the degree of imminence extremely high." *Landmark Communications, Inc.* v. *Virginia,* —— U.S. —— (1978). Moreover, as is also clear from the Court's decisions in *Oklahoma Publishing Co.* v. *District Ct.,* 430 U.S. 308 (1977), *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976), and *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1972), any attempt to suppress, either by prior restraint or subsequent punishment, the publication of facts and events which are revealed by public officials violates "settled principles" of constitutional law.

In *Oklahoma Publishing Co.,* for example, this Court held that a trial court's order enjoining the publication of a juvenile defendant's name and picture, which were legally obtained, was an abridgment of the freedom of the press guaranteed by the First and Fourteenth Amendments. In that case, a railroad switchman was fatally shot by an eleven-year-old boy. After a hearing attended by representatives of the media, at which the juvenile was formally charged with delinquency, a number of stories using the boy's name and photograph appeared in the local newspapers. Subsequently, the trial court entered a pre-trial order prohibiting further publication of the juvenile's identity. In striking down the trial court's order, this Court noted that there, as here, there was "no evidence that petitioner acquired the information unlawfully." According to the Court, this, coupled with the fact that the juvenile's name was a matter of public knowledge, rendered the trial court's action clearly invalid.

Petitioners' attempt to distinguish the Court's decision in *Oklahoma Publishing Co.,*[5] as well as the Court's earlier decision in *Cox Broadcasting,*[6] on the grounds

[5] While attempting to distinguish this Court's reversal of the State Supreme Court in *Oklahoma Publishing Co., supra,* Petitioners, like the Oklahoma state court, rely primarily on *Government of Virgin Islands* v. *Broadhurst,* 285 F.Supp. 831 (D.C. Virgin Islands, 1968), the reasoning in which this Court inevitably considered and found unpersuasive.

[6] In *Cox Broadcasting,* this Court held that a state could not impose sanctions on the accurate publication of a rape victim's name "which was publicly revealed in connection with the prose-

that the information published in those cases was obtained with the acquiescence of the Court in *Oklahoma* and from a public record (indictment) in *Cox*, while Respondents in the instant case learned the identity of the juvenile defendant through interviews with local law enforcement officers and an assistant prosecuting attorney. Such a distinction is, however, clearly too tenuous to be of any significance.

That First Amendment protections are not limited to accurate information obtained with the acquiescence of a court or from a public "record" is implicit in this Court's recent decision in *Landmark Communications, Inc.* v. *Virginia,* —— U.S. —— (May 1, 1978). There, the Virginian Pilot published, in violation of Virginia law, accurate information regarding the identity of a judge being investigated in a proceeding of the Virginia Judicial Inquiry Commission for which confidentiality was mandated by the Virginia Constitution. In striking down the Virginia statute under which Landmark Communications, Inc., the owner of the Virginian Pilot, was prosecuted for publishing that information, this Court addressed itself solely to the narrow question of whether the First Amendment permits the criminal prosecution of third persons who are strangers to an inquiry from publishing truthful information regarding a confidential proceeding. In ruling that the criminal statute, as applied to Landmark, was violative of the First Amendment, the Court did not concern itself with how the Virginian Pilot learned the identity of the judge being investigated.

---

cution of the crime." 420 U.S. at 471. There a reporter learned the identity of the victim from an examination of indictments.

Based upon the foregoing then, it is clear that the West Virginia Supreme Court of Appeals in rendering its decision below correctly applied this Court's decisions cited above.

The decision below does not represent a significant expansion of existing legal principles and does not warrant review by this Court.

Even if the Court were to grant the petition for writ of certiorari, the decision of the West Virginia Supreme Court of Appeals is clearly sustainable on other well-established federal constitutional grounds which, while raised below and in Respondents' Statement of the Questions Presented, were not addressed in the opinion below. The statute in question is on its face violative of the First and Fourteenth Amendments as a denial of equal protection because it imposes criminal sanctions against newspapers only (without any attempt to proscribe publication by any other printed media or by radio or television) and because it is overly broad and bears no reasonable relation to a valid state interest. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

CONCLUSION

This Court held in *Oklahoma Publishing Company:*

> "No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. *There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were 'publicly revealed in connection with the prosecution of the crime'* much as the name of the rape victim in Cox Broadcasting was placed in the

public domain. Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments." 430 U.S. at 311, 312.

Based on that holding and the other decisions of this Court cited herein interpreting and applying the free press guarantee of the First Amendment, certiorari should be denied.

Respectfully submitted,

DAILY MAIL PUBLISHING CO.,
JACK MAURICE AND MARY SCHNACK

By Counsel

F. PAUL CHAMBERS
MICHAEL A. ALBERT
W. HENRY JERNIGAN, JR.
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322

Counsel for Respondents

APPENDIX

NO. 14158

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.

v

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.

NO. 14180

DON MARSH, ET AL.
THE DAILY GAZETTE CO., ETC., ET AL.

v

HON. ROBERT K. SMITH, JUDGE, ETC.

In Prohibition — Writ awarded.

Neely, Justice

1. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.

2. To the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code*, without the prior approval of the trial court, *W. Va. Code*, 49-7-3 [1941] is unconstitutional as repugnant to the First Amendment to the *Constitution of the United States* because it creates an impermissible prior restraint on the freedom of the press.

Neely, Justice:

These two cases, which have been consolidated for

decision, both present a conceptionally indistinguishable permutation of a classic First Amendment, freedom-of-the-press issue concerning prior restraint on publication which the United States Supreme Court has addressed numerous times in the last ten years. These original jurisdiction proceedings seek to prohibit the respondent judges of the Circuit Court of Kanawha County, and the Prosecuting Attorney of Kanawha County from prosecuting petitioners under *W. Va. Code*, 49-7-3 [1941] which forbids any newspaper from publishing the name of a child in connection with any juvenile proceeding without the permission of the trial court. The petitioners are the *Charleston Gazette;* its Publisher, W. E. Chilton, III; its Editor, Don Marsh; one of its reporters, Leslie H. Milam; *The Charleston Daily Mail;* its Editor, Jack Maurice; and one of its reporters, Mary Schnack.

On 10 February 1978 both newspapers printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The respondent prosecuting attorney sought and obtained indictments against petitioners on 1 March 1978 for knowingly and unlawfully violating *Code*, 49-7-3 [1941]. That statute provides:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

Petitioners urge that *W. Va. Code*, 49-7-3 [1941] violates *W. Va. Const.*, art. 3, § 7, which is the state counterpart to the First Amendment to the *Constitution of the United States.* While ordinarily a constitutional question would be decided on state grounds in the first instance, thus avoiding a needless federal question, we find that in this instance it is better practice to rely upon a well developed body of federal law rather than an essentially nonexistent body of state law. Our regular use of state constitutional provisions is grounded in their capacity to be broader, in the sense of being more protective of individual rights, than the federal constitution; however, with regard to the First Amendment it would be diffiicult to find a more expansive interpretation of freedom of the press than that developed by the Supreme Court of the United

States. Even if we were to hypothesize that a broader guaranty might one day be necessary, it would be unwise to formulate new rules in the context of cases whose facts do not compel a minute inquiry into the sagacity of the new rules urged upon us. Furthermore, it is more serviceable to use federal law because of the interrelationship among all of the various news media, some of which are primarily governed by federal law, thereby providing a uniform resolution of these issues throughout the United States.

Recent cases demonstrate that the United States Supreme Court is concerned with all cases involving the First Amendment and that they are regularly responsive to the need for daily supervision of this area of the law throughout the United States. Accordingly in the interest of comprehensibility and uniformity we decide this case according to crystal clear principles of federal law concerning freedom of the press.

I

The preeminent rule with regard to prior restraint on free speech has recently been articulated by the Chief Justice of the United States in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), citing with approval *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971):

> Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.

An exegesis of the reasoning of the Supreme Court of the United States with regard to the issue of prior restraint is hardly appropriate here since that Court has done it in substantial length themselves in numerous cases involving this very issue.[1]

---

[1] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (denying use of municipal facilities for a play production based on city board's judgment of content is an impermissible prior restraint); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (court order barring newspaper from referring to sex in employment headings not prior restraint endangering free speech; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 1969) (overbroad parade permit requirements unconstitutional); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968) (injunction against a public meeting, granted without a hearing, constitutes an unconstitutional prior restraint); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (motion picture censorship statute unconstitutional); *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (system of informal censorship of books held unconstitutional); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (denial of a film license on basis film was "sacrilegious" unconstitutional); *Niemotko* v. *Maryland*, 340 U.S. 268 1951) lack of standards in license-issuing practice for city park use makes the practice a prior restraint in contravention of the 14th Amendment). *Grosjean* v. *American Press Co.*, 297 U.S. 233 1936) (invalidating discriminatory tax on press as an impermissible prior restraint). In addition to these are the cases of *Landmark Communications, Inc.* v. *Commonwealth of Va.*, U.S. , 56 L. Ed.2d 1 (1978); *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L. Ed.2d 355 (1977); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) and *Near* v. *Minnesota*, 283 U.S. 697 (1931) which are discussed in the text of this opinion.

Although the Supreme Court has never taken an absolutist position that there can be no abridgment of the freedom of the press under any circumstances, it would appear that outside of the area of pornography there is no governmental interest sufficiently compelling to justify a prior restraint in times of peace. We suspect, although we cannot prove, that the Supreme Court would authorize a prior restraint with regard to publication of military intelligence in a time of serious national peril and concerning a dangerous and indispensable operation such as the Allies' invasion of Normandy in 1944. A relatively concise statement of the two well recognized exceptions to absolute freedom from prior restraint was stated in *Near* v. *Minnesota*, 283 U.S. 697 (1931) and cited with approval by Justice Brennan in his concurring opinion in *Nebraska Press Assn., supra*, as follows: (1) to prevent the disclosure of information that would inevitably, directly, and immediately cause irreparable damage to the Nation in time of war; and (2) to suppress expression which is simply not deemed "speech" within the meaning of the First Amendment, such as obscenity or incitements to violence or revolution by force. In addition to these two exceptions discussed by Justice Brennan, it appears that with regard to acts which are verbal in nature, as for example a parade, a third exception is the regulation of the time, place and manner of expression, without unduly limiting the opportunity for expression. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

II

It is inevitable that if the Supreme Court takes something less than an absolutist position that all those

who seek to impose prior restraint upon the press will attempt to bring themselves within the exceptions. So it is in these cases that the State of West Virginia argues that a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice, are sufficiently compelling to permit the statute under review to withstand constitutional scrutiny. We disagree with this conclusion because the Supreme Court of the United States has uniformly held over the past ten years that similar legitimate state and private interests were not sufficiently compelling to permit a prior restraint. The case of *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed.2d (1977) leaps instantly to mind in this regard. In that case an Oklahoma statute provided for juvenile proceedings to be held in private and for juvenile records to be open to public inspection only by order of the court. A state court enjoined news media from publishing the name or photograph of an eleven year old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second degree murder. The Supreme Court, inevitably recognizing all of the beneficent purposes to be served by confidentiality held the prior restraint unconstitutional. We see little distinction between that case and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt.

If there were any doubt about restraint after *Oklahoma Publishing*, it was laid to rest in *Landmark Communications, Inc.* v. *Commonwealth of Va.*, *U.S.*

, 56 L.Ed.2d 1 (1978) where the Commonwealth of Virginia attempted to subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before state judicial review commissions. The Supreme Court recognized the legitimate state interest to be served by secrecy, namely "the confidentiality requirement can be said to facilitate the work of the commission in several practical respects. When removal or retirement is justified by the charges, judges are more likely to voluntarily resign or retire without the necessity of a formal proceeding if the publicity which would accompany such proceeding can thereby be avoided." Nonetheless the Supreme Court found that the integrity of government by free discussion would be jeopardized by this particular restraint and invalidated the statute.

Finally, in the case of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975) the Supreme Court held that a Georgia tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim (which was a matter of public record) was an unconstitutional restraint in spite of the legitimate state interest in protecting innocent vicims from embarrassment.

The Supreme Court over the past 50 years has had briefed before them every conceivable First Amendment issue by the ablest and most agile legal minds of this century; nonetheless, after repeated, well-considered, and apparently agonizing evaluation of the issues involved, that Court has concluded that a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent

operation of a democratic society.[2] While it makes no difference whether we agree with them, we gratuitously add that we do. Accordingly we find that to the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code* it is repugnant to the First Amendment to the *Constitution of the United States* as a prior restraint on the freedom of the press.[3] Accordingly the writs of prohibition for which petitioners pray are awarded.

Writ awarded.

[2]*See*, for example, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) involving the famous "Pentagon Papers" during the Vietnam War. Counsel on all sides were among America's most eminent.

[3]As we have resolved this issue on broad First Amendment grounds, we find it unnecessary to reach the issue of whether *W. Va. Code*, 49-7-3 [1941] unconstitutionally discriminates against newspapers; is unconstitutional when seeking to sanction acts which could not endanger the legitimate state purposes sought to be achieved; or, violates the *West Virginia Constitution* because the title of Chapter 65, *Acts of the Legislature*, Regular Session 1977 failed to set forth in the title to the act the fact that such act was making it a crime to publish the name of the child accused of a capital offense.